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SAW SENG ENG v. LEMBAGA BANDARAN KUDAT

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LIM HOCK LENG J
[CASE NO: BKI-22NCVC-55-8-2021]
1 JULY 2024

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Abstract – *Any permanent structure built on a private land, would be treated as part of the land, by s. 4 of the Land Ordinance (Sabah) (Cap 68) ('SLO'), which provides that 'land' includes, inter alia, all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface. Hence, the ownership of a structure built on the land is vested in the registered proprietor who is in possession of the land at the material time the structure is built.*

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TORT: *Trespass – Structures – Construction of concrete jetty on private land – Whether registered proprietor knew of existence of concrete jetty before application for land made – Whether concrete jetty part of land under s. 4 of Land Ordinance (Sabah) (Cap 68) – Whether concrete jetty constructed with approval of relevant authorities – Whether illegal structure – Whether built when registered proprietor already entitled to possession of land – Whether encroachment intentional – Whether trespass made out*

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LOCAL GOVERNMENT: *Local Authority – Duties of local authority – Construction of concrete jetty on private land – Claim for trespass by registered proprietor – Whether jetty served public purpose – Whether concrete jetty constructed with approval of relevant authorities – Whether illegal structure – Whether built when registered proprietor already entitled to possession of land – Whether intentional encroachment on land – Whether trespass made out – Whether jetty ought to be demolished*

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The plaintiff was a registered proprietor of a parcel of land by the sea in Kudat, held under Town Lease 057506288. Initially, the plaintiff occupied the land under temporary occupation licences ('TOL') and it was later alienated by the Jabatan Tanah dan Ukur ('JTU') to the plaintiff. The plaintiff sued the defendant, the local authority, for trespass for constructing a concrete jetty on the land and causing others to use it despite his demands for the structure to be dismantled and removed. The plaintiff also averred that the concrete jetty was an illegal structure constructed without the approval of the statutory bodies responsible for the establishment, operation and maintenance of jetties, ports and harbours as well as the regulation of the waterways in Sabah. Additionally, the plaintiff took the position that the use of the concrete jetty was obstructive to vessels around the area. The crux of the defendant's case was that 'the defendant's jetty was built legally long

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before the title deed for the said land was registered and the defendant's jetty is used for public purpose'. The defendant argued that there had never been any complaints from a statutory body about the jetty since it started operations in the 1990s, and that the recent complaints were an afterthought. The defendant also argued that the plaintiff had misled the JTU. Hence, in its counterclaim, the defendant sought a declaration that; (i) the plaintiff had wrongly and unconscionably applied for the land, although he was aware that the defendant's jetty served a public purpose; (ii) a declaration that the alienation of the land to the plaintiff was unlawful, and; (iii) an order that the issuance of Town Lease 057506288 be set aside.

Held (allowing plaintiff's claim for trespass; dismissing defendant's counterclaim):

(1) While the plaintiff had applied for the land on 10 July 2003 and the defendant had subsequently applied for the land on 8 January 2009, it was clear that the land applications did not create or confer on any applicant any rights over the subject land. The Director of the JTU had the discretion to alienate land to such applicant as he considers appropriate, including the plaintiff, subject only to the direction of the State Cabinet. However, the Director of the JTU was not named as a party to this action and had not been given the opportunity to be heard. In any case, the court was not seised of original jurisdiction. The matters raised by the defendant so far as they related to the decision of the Director of the JTU to alienate the land to the plaintiff could only come before the court on appeal under s. 41(1) of the Land Ordinance (Sabah) (Cap 68) ('SLO'). (paras 10-13)

(2) The defendant's complaint that it was wrong of the plaintiff to apply for the land when he knew of the jetty's existence on it was misconceived and misleading, as the concrete jetty was not in existence when the plaintiff applied for the land on 10 July 2003. Even if the plaintiff had known of the concrete jetty at the time he applied for the land, such knowledge was irrelevant as the plaintiff was the registered owner of the land. By s. 4 of the SLO, the jetty would be treated as part of the land, the ownership of which was vested in the plaintiff. Further, the jetty was an illegal structure as there was no approval for the concrete jetty by the Jabatan Pelabuhan dan Dermaga Sabah, Sabah Ports Authority, and Sabah Ports Sdn Bhd. (paras 14-17, 20, 23 & 24)

(3) The concrete jetty was built at a time when the plaintiff was already entitled to possession/occupation, *albeit* under a TOL. An intentional encroachment on land to which the plaintiff was entitled to possession was actionable as a trespass, even if it was done under the mistaken belief of a right of entry. Further, the defendant had no objection to the extension of the plaintiff's TOL until the title deed for the plaintiff's land

application could be issued. The defendant had also supported the plaintiff's land application on various occasions. The plaintiff had made out his case of trespass against the defendant. (paras 29, 33, 34 & 40)

(4) While the Minister of Local Government may exercise a certain degree of control over a local authority in Sabah, a local authority such as the defendant was nonetheless a separate entity. This is made clear by s. 7 of the Local Government Ordinance. In this case, the separate legal entity principles would be applicable. Further, local authority does not fall within the interpretation of 'Government' in s. 2 of the Government Proceedings Act 1956 (*Ronald Philip Devereux & Anor v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Ors*). An order was thus granted for the defendant to demolish the concrete jetty it had constructed on the plaintiff's land and to remove all structures, materials and debris on the said land and to reinstate that part of the land to its original condition within six months from the date hereof, failing which the defendant should pay the plaintiff the actual, reasonable costs for the said demolition and said reinstatement. The plaintiff was awarded nominal damages. (paras 60, 62, 64, 65 & 72)

Case(s) referred to:

Abdul Aziz Mohamed Ginan & Ors v. Datuk Bandar Kuala Lumpur [2008] 1 CLJ 464 HC ***(refd)***

Bandar Utama City Corporation Sdn Bhd v. Datuk Bandar, Majlis Bandaraya Petaling Jaya [2016] 6 CLJ 576 HC ***(refd)***

Burhan Ating & Ors v. Directors Of Lands & Surveys & Ors [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 HC ***(refd)***

Chong Sui Jin v. Jeramas Sdn Bhd & Anor And Another Case [2012] CLJU 896; [2012] 1 LNS 896 HC ***(refd)***

Chua Sai Ngoh (f) v. Beh Ai Meng [1955] CLJU 20; [1955] 1 LNS 20 HC ***(refd)***

Datuk Bandar Kuala Lumpur v. Abdul Aziz Mohamed Ginan & Ors [2007] 3 CLJ 399 CA ***(refd)***

Dr Lourdes Dava Raj Curuz Durai Raj v. Dr Milton Lum Siew Wah & Anor [2020] 9 CLJ 192 FC ***(refd)***

IOI Corporation Bhd v. Gemencheh Granite Sdn Bhd [2015] 10 CLJ 332 HC ***(refd)***

Johandra Realty Sdn Bhd & Satu Lagi lwn. Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia & Satu Lagi [2021] 2 CLJ 485 CA ***(refd)***

Maikal Hashim v. Chai Nang Yung [2018] CLJU 2259 [2018] 1 LNS 2259 HC ***(refd)***

R Meyyanathan Retnasamy v. Dewan Bandaraya Kuala Lumpur [2024] 1 CLJ 570 HC ***(refd)***

Rethnasamy v. Teoh Ngoo Mooi & Anor [1982] CLJU 82; [1982] 1 LNS 82 HC ***(refd)***

Ronald Philip Devereux & Anor v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Ors [2013] 3 CLJ 287 HC ***(refd)***

Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC ***(dist)***

Superintendent Of Lands And Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd [2009] 6 CLJ 751 CA ***(refd)***

Terence Garnica & Anor v. Maldu Hashim & Anor [2022] CLJU 3142; [2022] 1 LNS 3142 HC ***(refd)***

Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC ***(refd)***
The State Government Of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors [2017] 2 CLJ 379 CA ***(refd)***
Veerasingam Subramaniam & Ors v. Datuk Bandar Kuala Lumpur [2012] 3 CLJ 1041 HC ***(refd)***
Yap Ea Teck v. Yang Dipertua Majlis Daerah Kota Tinggi [1995] 2 BLJ 157 HC ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, ss. 2, 29
Local Government Act 1976, ss. 7, 13, 18
Ports and Harbours Enactment 2002, s. 14(1)
Sabah Land Ordinance, ss. 4, 6, 9, 12, 41(1), 37, 50, 88
Sabah Land Rules, r. 2
Specific Relief Act 1950, s. 54(d)

For the plaintiff - Irwin Chang; M/s Lind Willie Wong & Chin
For the defendant - Sonny Durai; M/s Allion Kitingan & Partners

Reported by S Barathi

JUDGMENT

Lim Hock Leng J:

The Parties And The Dispute

[1] The plaintiff is the registered proprietor of a parcel of land in Kudat which is by the sea, and held under Town Lease 057506288. The land measures 7,621.40 square meters more or less.

[2] The plaintiff had applied for the land on 10 July 2003. He occupied the land under temporary occupation licences ("TOLs") since 2009.

[3] The land was eventually alienated by the Jabatan Tanah dan Ukur to the plaintiff, and the title deed for the land was issued to him on 8 November 2019.

[4] He sued the defendant, the local authority, for trespass, for constructing a concrete jetty on the land, and causing others to use it despite his demands for the structure to be dismantled and removed.

[5] In his suit, the plaintiff also averred that the defendant's concrete jetty was an illegal structure constructed without the approval of the statutory bodies responsible for the establishment, operation and maintenance of jetties, ports and harbours, as well as the regulation of the waterways in Sabah. In addition, the plaintiff took the position that the use of the concrete jetty was obstructive to vessels around the area, in particular the Ro-Ro ramp nearby.

[6] The crux of the defendant's case appears to be that "the defendant's Jetty was built legally long before the title deed for the said land was registered, and the defendant's jetty is used for public purpose," and the natives of Kudat were using the defendant's jetty which was built with funds obtained from the Federal Government in 2019. The defendant pleaded that the premium was a mere RM76,500.

[7] The defendant argued that there had never been any complaints from a statutory body about the jetty since it started operations in the 1990s, and that the recent complaints are an afterthought.

[8] The defendant further argued that the plaintiff had misled the Jabatan Tanah dan Ukur.

[9] By its counterclaim, it sought a declaration that the plaintiff had wrongly and unconscionably applied for the land although he was aware of the defendant's jetty which served a public purpose, a declaration that the alienation of the land to the plaintiff was unlawful, and an order that the issuance of Town Lease 057506288 be set aside.

Evaluation Of The Evidence And Findings

[10] While the plaintiff had applied for the land on 10 July 2003 and the defendant had subsequently applied for the land on 8 January 2009, it is clear that the land applications do not create or confer on any applicant any rights over the subject land. See s. 12 of the Sabah Land Ordinance and r. 2 of the Sabah Land Rules, and the decision of the Court of Appeal in *The State Government Of Sabah & Ors v. Clarence Chiuh Ken Loong & Ors* [2017] 2 CLJ 379; [2017] 3 MLJ 127.

[11] The director of the Jabatan Tanah dan Ukur has discretion to alienate land to such applicant as he considers appropriate, including the plaintiff, subject only to the direction of the State Cabinet. See s. 9 of the Land Ordinance.

[12] The defendant's complaint that the land was unlawfully alienated and the title deed was wrongly issued, as well as the insinuation that the premium was too low, must be given short shrift as the director of the Jabatan Tanah dan Ukur is not named as a party to the action herein and has not been given the opportunity to be heard. See the decision of the Federal Court in *Dr Lourdes Dava Raj Curuz Durai Raj v. Dr Milton Lum Siew Wah & Anor* [2020] 9 CLJ 192.

[13] In any case, the court is not seised of original jurisdiction. The matters raised by the defendant so far as they relate to the decision of the Director of the Jabatan Tanah dan Ukur to alienate the land to the plaintiff could only come before the court on appeal under s. 41(1) of the Land Ordinance. See *Burhan Ating & Ors v. Directors Of Lands & Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211.

[14] The defendant's complaint that it was wrong of the plaintiff to apply for the land – when he knew of the jetty's existence on it – is misconceived and misleading.

[15] In the first place, the concrete jetty was not in existence when the plaintiff applied for the land on 10 July 2003. The concrete jetty was only built in 2019. The evidence shows that only a wooden jetty which had fallen into disrepair was on the land.

[16] Next, and this is of some importance, a person who builds a permanent structure on a State land – which was the status of the land before it was alienated to the plaintiff – runs the risk that he will incur the time and expense in putting up the structure in vain, in the event the State evicts him or the director alienates the land to another person. By s. 4 of the Land Ordinance, "land" includes "(d) all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface…" The jetty would thus be treated as part of the land, the ownership of which is vested in the plaintiff. See also *Chua Sai Ngoh (f) v. Beh Ai Meng* [1955] CLJU 20; [1955] 1 LNS 20; [1955] 1 MLJ 167; and *Rethnasamy v. Teoh Ngoo Mooi & Anor* [1982] CLJU 82; [1982] 1 LNS 82.

[17] Further, the jetty, be it in its present concrete form or in its previous iteration as a wooden jetty, is an illegal structure and also obstructive to vessels making use of the adjacent Ro-Ro ramp.

[18] In this regard, reference is made to two letters from Jabatan Pelabuhan dan Dermaga Sabah ("JPDS"), a statutory authority established by the Ports and Harbours Enactment 2002 to control and regulate traffic by water in ports and harbours, and waters within the limits of Sabah. As highlighted by learned counsel for the plaintiff, s. 2 defines "harbours" to include jetties, while s. 5 states that the Director of JPDS has a duty to control and regulate traffic by water with safety in mind.

[19] Both JPDS letters are dated 19 December 2022. One was addressed to the plaintiff. The other was addressed to the defendant, informing it that the jetty had not been approved and that the jetty could affect the operations and activities in the port area. The JPDS referred to s. 14(1) of the Ports and Harbours Enactment 2002 which states that "it shall not be lawful (a) to construct any structure in any port area or otherwise which may affect the traffic and safety of the navigation."

[20] There was no approval for but rejection of the jetty by the LPPS. Felix bin Liangson (PW2), its former General Manager who retired in 2022, referred to his letter dated 2 June 2021 which informed the plaintiff that the concrete jetty was too close to the Ro-Ro ramp and would obstruct boats and ferries docking there. An investigation revealed that the distance between the concrete jetty and the Ro-Ro ramp was only about 40 meters. PW2 also

A referred to a LPPS letter dated 3 November 2021 stating that ferries and vessels would require a large area to manoeuvre and the concrete jetty which was obstructive would need to be demolished. PW2 further referred to a letter to him from Sabah Ports Sdn Bhd dated 9 November 2021. PW2 was informed that, following an investigation, the jetty was still being used B though prohibition and warning signs were there. The evidence of Solibang bin Tanjong (PW3), a former Planning and Development Manager of LPPS, was corroborative of PW2's evidence.

[21] The defence called Chong Chen Bin (DW2), the Assemblyman for Tanjung Kapor in Kudat, to give evidence that the Ro-Ro ramp is not in use. C There was overall conflicting evidence on whether it was in use, but the case does not turn on that point. That aside, it appears that the Ro-Ro ramp will be in use once the Kudat-Palawan ferry route is operational.

[22] Even if it is not in use presently, the concrete structure is unlawful since it has not been approved by JPDS. D

[23] The non-approval of the concrete jetty by JPDS, LPPS, and Sabah Ports Sdn Bhd was confirmed by Jasmin Lumbok (DW1), the defendant's assistant engineer. He agreed that the defendant did not obtain approval for the jetty from JPDS, or permission for it from the other two entities, both before and after its construction. E

[24] Furthermore, even if the plaintiff had known of the concrete jetty or for that matter, the wooden jetty, at the time he applied for the land, such knowledge is irrelevant as the plaintiff is the registered owner of the land.

[25] Section 88 of the Land Ordinance, provides that no claim to or interest F in any land, except for land still held under native customary tenure without documentary title shall be valid until it has been registered.

[26] In *R Meyyanathan Retnasamy v. Dewan Bandaraya Kuala Lumpur* [2024] 1 CLJ 570, a case concerning an action for trespass against the local authority maintaining a monsoon drain which it had built on the plaintiff's land, the G Kuala Lumpur High Court held that the plaintiff was entitled to succeed although he "had bought the land with full knowledge of the location of the monsoon drain on his land."

[27] Learned counsel for the defendant cited the Federal Court's decision H in *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173 to argue that registration of the land in the plaintiff's name does not make the title indefeasible. The facts of that case are, however, materially different. There, a forged instrument of transfer vitiated the title. In the instant case, to recapitulate, subject only to the directions of the State Cabinet, the Director of the Jabatan Tanah dan Ukur has discretion to alienate land; and s. 41 of I the Land Ordinance makes it clear that this court has no original jurisdiction to adjudicate the director's decision to alienate the land to the plaintiff.

[28] Learned counsel for the defendant also sought to distinguish *R Meyyanathan Retnasamy* (*supra*), by arguing that the land was State land before it was alienated to the plaintiff and the wooden jetty was on State land long before the alienation. The argument is spurious, as adverse possession or occupation confers no rights. See s. 6, Land Ordinance.

[29] It may be added that the concrete jetty was built at a time when the plaintiff was already entitled to possession/occupation, *albeit* under a TOL. It is trite that an intentional encroachment on land to which the plaintiff is entitled to possession is actionable as a trespass, even if it was done in the mistaken belief of a right of entry. See *Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657, 665 to 666.

[30] The reliance of the defendant on purported equitable rights is misplaced in view of the various provisions in the Land Ordinance which were relied upon by the plaintiff.

[31] If at all, it is the defendant that is estopped from questioning the plaintiff's proprietary and possessory rights as the registered owner. In this regard, learned counsel for the plaintiff identified various strands of evidence.

[32] The defendant wrote to the Assistant Collector of Land Revenue, Jabatan Tanah dan Ukur on 12 October 2009, stating that it had no objection to the plaintiff's land application.

[33] By its letter dated 23 April 2023 addressed to the plaintiff, the defendant stated that it had no objection to the extension of the plaintiff's TOL until the title deed for the plaintiff's land application could be issued.

[34] Moreover, both DW1 and DW3 testified that the defendant had supported the plaintiff's land application on various occasions but sought to downplay or excuse the support.

[35] In particular, DW3 had, on behalf of the defendant, attended the Mesyuarat Jawatankuasa penggunaan tanah held on 25 March 2010, and supported the plaintiff's land application.

[36] Although DW3 in his witness statement averred that he would not have supported the plaintiff's land application had he known that the defendant's concrete jetty was on the land applied for, the court is unable to give the averment much credence since DW3 was in the employment of the defendant itself and should know about the location of the jetty put up by the defendant, more so when he was giving his support at a formal meeting.

[37] Importantly, DW3 acknowledged that he had visited the land based on the plaintiff's land application before he supported it. See NOP, lines 2030-2038.

[38] Similarly, DW1 tried to explain that he did not know that the concrete jetty was on the plaintiff's land. DW1's explanation is unacceptable as the scope of his job was to go through development and building plans. Indeed, DW1 even agreed that the defendant did not check on the availability of the subject land after it received the Federal Government grant. When it was put to him that the defendant should have checked, all DW1 could say was: "Saya hanya terima arahan." See NOP, lines 1465-1470.

[39] It does not lie in the defendant's mouth to seek sympathy by saying that the locals of Kudat are now deprived of the use of the concrete jetty built on the plaintiff's land, and that the Federal Government funds would be wasted. The defendant has only itself to blame.

Conclusion And Orders

[40] Despite the valiant efforts of learned counsel for the defendant, for the reasons given, the court finds that the plaintiff has made out his case of trespass against the defendant whose counterclaim is dismissed.

[41] The plaintiff had abandoned prayer (a). In respect of prayer (b), it reads: "An order that the defendant do forthwith demolish the defendant's jetty and removal all structures, materials and debris therefrom the said land following such demolition and to reinstate the that part of the said land to its original condition."

[42] The court was of the view that it was injunctive in nature, bearing in mind that s. 54(d) of the Specific Relief Act 1950 provides that "an injunction cannot be granted … to interfere with the public duties of any department of any Government in Malaysia, or with the sovereign acts of a foreign Government," while s. 29 of Government Proceedings Act 1956 provides: "(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties ...".

[43] The parties were invited to submit on the point.

[44] The plaintiff argued that that prayer (b) is not an injunction in substance since it "is clearly not a standalone matter but will only arise or become effective if the plaintiff succeeds with his overall claim of trespass against the defendant." It is somewhat difficult to discern any logic in the argument.

[45] The other argument put up by the plaintiff was that s. 54(d) of the Specific Relief Act 1950 is inapplicable as prayer (b) does not prevent or restrain the defendant from discharging any of its public duties. While that may be so, the plaintiff did not deal with s. 29 of Government Proceedings Act 1956.

[46] This court is mindful that in *Superintendent Of Lands And Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751; [2009] 2 MLRA 659, the Court of Appeal held: "… s. 29 of the GPA does not permit the granting of any injunction against the Government. Likewise, s. 54 of the SRA prohibits the grant of an injunction against any Malaysian Government department." In so holding, the Court of Appeal referred to, *inter alia*, the majority decision of the Supreme Court *Government Of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12. However, in those cases, the party sought to be injuncted was either the Government itself or a Government officer.

[47] Thus, ultimately, the issue here appears to be whether a local authority is to be treated as part of the Government or a Government department.

[48] In *Yap Ea Teck v. Yang Dipertua Majlis Daerah Kota Tinggi* [1995] 2 BLJ 157; [1995] MLJU 55, Abdul Malik Ishak J (as His Lordship then was) was of the view that a local authority is a Government department. He explained his reasoning thus:

> By its very name "Local Government Act, 1976 (Act 171)" one can easily identify the local authority as defined under section 2 thereof to be and to come within the scope of section 54(d) of the Specific Relief Act, 1950 (Revised 1974) *ie*, "... any department of any Government of Malaysia ..." and, consequently, perpetual injunction sought for against the President of MDKT should be dismissed forthwith with costs as it is barred by that section of the Specific Relief Act, 1950 (Revised 1974). With respect, I do not subscribe to *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* (1983) 1 MLJ 323 for three simple reasons. Firstly, the President of MDKT is cited here by his office in his official designation as a defendant in this Originating Summons and by virtue of section 126 of the Local Government Act, 1976 (Act 171) he is deemed to be a public servant within the meaning of the Penal Code and by necessary inference he is also governed by the Public Officers (Conduct and Discipline) (Chapter D) General Orders, 1980. As MDKT is a product of the Local Government Act, 1976, it is a government department and remains so to this day.

[49] In *Veerasingam Subramaniam & Ors v. Datuk Bandar Kuala Lumpur* [2012] 3 CLJ 1041; [2012] 8 MLJ 479, Zabariah J (as Her Ladyship then was) adopted the reasoning of His Lordship:

> [48] Further, local authority, like the defendant is a department of the Government of Malaysia (refer to *Yap Ea Teck v. Yang Di-Pertua Majlis Daerah Kota Tinggi* [1995] 2 BLJ 157), which is subservient to the Minister charged with the responsibility for local government. As a government department, the defendant cannot be subject to an injunction, be it interim or perpetual (refer to the case of *Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No 2)* [2002] 1 MLJ 508; [2002] 6 CLJ 6).

[50] At the other end of the spectrum, reference may be made to *Abdul Aziz Mohamed Ginan & Ors v. Datuk Bandar Kuala Lumpur* [2008] 1 CLJ 464; [2007] 3 MLJ 12. In that case, the plaintiffs were issued notices by the defendant to vacate and demolish their houses so as to make way for the DUKE Highway project. The plaintiffs filed an *inter partes* application to restrain the defendant from demolishing their houses. Among the issues was whether the DUKE Highway project was a Government or private project, and whether the High Court could grant the injunction against the defendant. After holding that there was only slender evidence the project was a Government project, Mohd Hishamudin J (as His Lordship then was) held:

> Now, the office of Datuk Bandar is established by s. 4 of the Federal Capital Act 1960. His function is to administer the City of Kuala Lumpur. He is a corporation sole by virtue of s. 5(1) of the Federal (C)apital Act. He has his own legal personality independently of the Government; and, independently of the Government, he may sue and be sued. He may enter into contracts. He has a common seal. The Datuk Bandar is a local authority for the purposes of the Local Government Act 1976. The functions, powers and duties of the Datuk Bandar, as a local authority, are set out in the Federal Capital Act and, more extensively, in the Local Government Act. In my judgment, having examined the provisions of the Federal (C)apital Act and the Local Government Act, I take the view that the Datuk Bandar is a mere statutory authority, a local Government; but it is not a department of the Government like, say, the Road Transport Department, the Immigration Department, the Police Department or the Department of Customs and Excise. It is not a department of the Government for the purpose of s. 54(d).

[51] While the case concerned the grant of an interlocutory injunction, as opposed to an injunction after trial as in the instant case, the reasoning of Justice Hishamudin, in holding that a local authority is not a Government department, is compelling.

[52] Although the decision was reversed by the Court of Appeal, it was not because the defendant was considered a Government department.

[53] Zulkefli JCA (as His Lordship then was), in delivering the judgment of the Court of Appeal, held: "On the facts and circumstances of this case, we are more inclined to hold the view that the balance of convenience should tilt more in favour of the defendant." What the plaintiffs there claimed was compensation, not an interest in the land. Damages would be an adequate remedy.

[54] Also, the plaintiffs did not give any undertaking as to damages.

[55] In addition, the "interim injunction pending trial which was granted by the learned judge would cause the DUKE project to be delayed or abandoned as the full trial would take some considerable time to be concluded." See *Datuk Bandar Kuala Lumpur v. Abdul Aziz Mohamed Ginan & Ors* [2007] 3 CLJ 399; [2007] 4 MLJ 346.

[56] Further support for the proposition that a local authority is not a Government Department can be found in *Bandar Utama City Corporation Sdn Bhd v. Datuk Bandar, Majlis Bandaraya Petaling Jaya* [2016] 6 CLJ 576 where the matter received detailed and compelling analysis by Hanipah Farikullah J (now FCJ).

[57] Notably, s. 13 of the Local Government Act 1976 provides that a local authority shall be a 'body corporate' and should have perpetual succession and a common seal, and may sue and be sued, acquire, hold and sell property, generally do perform such and things as bodies corporate may by law do and perform.

[58] The court is mindful that the Local Government Act 1976 does not extend to Sabah. There is instead the Local Government Ordinance 1961 in Sabah, which has a similar provision *vide* s. 13 which will be considered shortly.

[59] It was pointed out for the defendant that s. 18 of the Local Government Act 1976 which deals with the Superannuation or Provident Fund makes no provision for pensions for the employees of local authority employees, unlike Government servants who receive pensions. Learned counsel for the defendant was also at pains to highlight certain provisions in the Local Government Ordinance 1961 by which the Minister of Local Government has and can exercise control over a local authority in Sabah, such as s. 14 by which questions of membership of the local authority shall be referred to the Minister, s. 37 which stipulates that a local authority may not enter into a contract exceeding a certain amount as may be directed by the State Cabinet, and s. 50 which stipulates that a local authority may make by-laws subject to the approval of the Minister.

[60] While the Minister of Local Government may exercise a certain degree of control over a local authority in Sabah, a local authority such as the defendant here is nonetheless a separate entity. Section 7 of the Local Government Ordinance – the equipollent provision of s. 13 of the Local Government Act 1976 – makes this clear.

[61] It reads: "Every Authority established under the provisions of this Ordinance shall be a body corporate having perpetual succession and a common seal and shall be capable in law of suing and being sued in its corporate title and of purchasing, holding and selling movable and immovable property."

[62] In *Bandar Utama City Corporation Sdn Bhd v. Datuk Bandar, Majlis Bandaraya Petaling Jaya* (*supra*), Justice Hanipah Farikullah held that the separate legal entity principles would be applicable. On that note, while the defendant in the instant case had highlighted the degree of control that the Minister has over a local authority, the defendant itself is a separate entity with its own seal, and was on its own able to defend and counterclaim on its own.

[63] Next, s. 2 of the Government Proceedings Act 1956 which provides that "Government" includes the Federal Government and the Governments of the State. Justice Hanipah Farikullah took cognisance of the preamble which provides that the legislation relates to proceedings by and against the Federal Government and the Government of the States. As such, it was not thought that the preamble in shedding light on the definition includes local authorities and "... it is emphatically not the province of the court to write into an Act of Parliament something which is not there."

[64] It may be added that in *Ronald Philip Devereux & Anor v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Ors* [2013] 3 CLJ 287, See Mee Chun JC (as Her Ladyship then was) similarly took the view that a local authority does not fall within the interpretation of "Government" in s. 2 of the Government Proceedings Act 1956.

[65] An order was thus granted for the defendant to demolish the concrete jetty it had constructed on the plaintiff's land and to remove all structures, materials and debris on the said land and to reinstate that part of the said land to its original condition within six months from the date hereof, failing which the defendant shall pay the plaintiff the actual, reasonable costs for the said demolition and said reinstatement.

[66] Since time to mobilise and carry out the demolition is required, the prayer that the concrete structure be demolished forthwith is not appropriate. The defendant should be given time to do so. In the absence of evidence showing otherwise, a period of six months would be appropriate. See *Chong Sui Jin v. Jeramas Sdn Bhd & Anor And Another Case* [2012] CLJU 896; [2012] 1 LNS 896.

[67] As for general damages, the plaintiff asked in closing submissions that "the rental for the trespass be calculated at the rate of RM1,000 per day for approximately 0.25 acres from the date of issuance of the title deed, *viz*, 8 November 2019". *Maikal Hashim v. Chai Nang Yung* [2018] CLJU 2259 [2018] 1 LNS 2259; *IOI Corporation Bhd v. Gemencheh Granite Sdn Bhd* [2015] 10 CLJ 332 and *R Meyyanathan Retnasamy* (*supra*) were cited.

[68] However, no evidence was adduced as to what might be the rental for the area occupied by the concrete jetty. It would be arbitrary in the circumstances to order a specific amount of general damages. In *Johandra Realty Sdn Bhd & Satu Lagi lwn. Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia & Satu Lagi* [2021] 2 CLJ 485; [2021] 2 MLJ 738, the Court of Appeal held that if the trespass causes a plaintiff actual damages, he will be entitled to such amount as will compensate him for his loss and, if there is no such evidence, a plaintiff who proves the trespass is nonetheless entitled to nominal damages. See also the decision of Celestina Stuel Galid J in *Terence Garnica & Anor v. Maldu Hashim & Anor* [2022] CLJU 3142; [2022] 1 LNS 3142.

[69] This is not an appropriate case to order an assessment of damages which would otherwise have been considered, if the evidence were such that the trial would be unduly delayed for evidence of the damages to be adduced.

[70] Here, there was no impediment for liability and quantum to be considered at the same trial. The plaintiff had in fact submitted on the quantum of general damages, although no cogent evidence was led as to the appropriate quantum.

[71] To break up every trial to establish liability and quantum separately would not be making the best use of judicial time, and would also run up extra costs for the parties.

[72] The plaintiff was instead awarded nominal damages of RM5,000 and 5% interest thereon from the date of judgment until full settlement.

[73] Costs is a matter of discretion for the court. In this case, no order as to costs was made since the plaintiff did not plead and ask for costs in his prayers, and there was no omnibus prayer for further relief or other orders as may be deemed fit and just. The court also did not find it appropriate to order costs or aggravated damages, as the purpose of building the concrete jetty on land which the defendant had also applied for, was not for profit but to serve the local people, especially the fishermen of Kudat.